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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1948

KIMBALL LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 3–14, vol. IV) is reported in 166 F. 2d 856. The district court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1948 (R. 15, vol. IV). The petition for a writ of certiorari was filed on May 28, 1948, and was granted on October 11, 1948. The jurisdiction of this Court rests on 28 U. S. C. 1254.

Ex. 10, R. 229–235; D. Ex. 12, R. 238–242), the amount of laundry work done each year from 1932 through 1941, measured (according to type) by the number of pieces, pounds or bundles handled (D. Ex. 24, R. 279–283), the total number of customers being served on November 21, 1942 (D. Ex. 11, R. 235–237), and the prices being charged for laundry and dry-cleaning services under O. P. A. ceilings in November 1942 (D. Exs. 28, 29, R. 295–297).

Evidence was also admitted on behalf of the Kimball Laundry Company that the original cost of the land was $50,000 (R. 385–386), that the fee value of the land in November 1942 was $30,000 (R. 314, 389), that the original cost of the building in 1925 was $199,945.95, the cost of an addition to the building in 1935 was $33,356.56 and the reproduction cost as of November 21, 1942, was $280,348, no allowance being made for depreciation (D. Ex. 19, R. 261–264). Evidence was also admitted to the effect that the cost of putting the building back in the same condition as it was in 1942 was $35,000 (R. 304–306, see D. Exs. 41, 42, R. 408, 412–415, 419), that the value of power equipment and machinery, including the boilers, was $62,928.98 in November 1942, and $30,260.53 in March 1946, leaving a difference in value before and after the taking of $32,667.55 (D. Ex. 23, R.

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* This represents gross income. Compare Defendant's Exhibit 7 (R. 221) for the years 1936–1942.

270–273, see also D. Exs. 43, 44, R. 408–412, 415–419, 420), that the value installed of all other machinery and equipment as of November 21, 1942, was $273,831.39 and as of November 1945 was $120,699.75, leaving a difference in value before and after the taking of $153,131.54 (D. Ex. 21, R. 247–251, 253–254, 258–260).[3]

On behalf of the United States two witnesses testified as to the fair annual rental or "use value" of the property taken, including damages incurred during the Government's use of the property. Cornelius G. Weber, an engineer and appraiser experienced in valuing industrial plants (R. 722–723), testified that the fair annual rental value was $70,000 or a total of $257,000 for the period from November 22, 1942, to June 30, 1946 (R. 729–735; Govt. Ex. 22, R. 735–737). He arrived at his estimate of value by allowing the following sums: $27,300 per year as a reasonable return on the value of the entire plant (i. e., 6% of $455,000, which was in his opinion the fair and reasonable value of the plant) (R. 728–730), $9,000 per year for taxes and insurance, $27,771.79 per year for depreciation on the building and machinery, including both normal and abnormal depreciation, the latter due to the heavy use of the property by the Government, $6,000

[3] As is the case with reference to many of the exhibits, Defendant's Exhibit 21, consisting of 23 pages, is not printed in full in the record (see R. 142–149).

for contingencies and uncertainties regarding expiration of the term, making a round total of $70,000 per year or $252,000 for 3.6 years (R. 730–733). These figures were adjusted later in the light of certain information obtained subsequent to the making of the appraisal and Weber gave as his final estimate of value for the term taken, including restoration and repair costs, the sum of $257,000 (R. 733–735; Govt. Ex. 22, R. 735–737). On cross-examination, Weber stated that the reproduction cost new of the entire plant without allowing for depreciation due to wear and tear or functional obsolescence, would be $642,925.20 (R. 744–746; see also Govt. Ex. 23, R. 751–752).

Lewis C. Sholes, a real estate man and appraiser with many years of experience, had examined and appraised the property shortly before it was taken by the United States, had observed it during the Government's occupancy and had examined and appraised it in the latter part of 1945 (R. 760–762, 771, 773, 784). He testified that the fair and reasonable rental value of the property including damages resulting from the use by the Army was $65,663 per year (R. 771) or a total of $253,066.80 for the 3 years 7 months' period including cost of repairs but not including the cost of moving back certain machinery and equipment which had not been used by the Government but had been removed

and stored at Fort Omaha (R. 772–776; Govt. Ex. 24, R. 777–778). Sholes' estimate of value was made up as follows: a return on investment of 5% of the value of the land and building, or $10,380 per year, and 7% of the value of machinery and equipment, or $15,813 per year, $23,220 per year for normal depreciation on the building, machinery and equipment, $4,500 per year for taxes, $750 per year for insurance, $2,000 per year for the owner for management and $9,000 per year for abnormal use of the property by the United States, making a total of $236,386.80 (R. 769–772). To this figure, Sholes added $16,680 for restoration and repair costs not included in his estimate of $9,000 per year for abnormal use, making a final total of $253,066.80 for the taking (R. 772–776, Govt. Ex. 24, R. 777–778). On cross examination, Sholes stated that in determining the total value of the property he had estimated reproduction cost new prior to deducting depreciation at $660,474.36 (R. 783–784).[*]

Appellant objected to the qualifications of these witnesses to give their opinions of value and to their testimony as to rental value on the ground that there was no showing that a laundry

[*] Sholes' value of the entire property after allowing for depreciation was as follows: land, $17,600 (R. 767), building, $190,000 (R. 767–768), power plant, $12,500 (R. 768), other machinery and equipment, $213,400 (R. 768), making a total value of $433,500 (R. 768).

had ever been rented and that this was not a proper way to value a temporary use. These objections were overruled (R. 728–729, 767–769).

Exhibits were introduced and several witnesses testified on behalf of the Government as to repairs and replacements made by the Government during its occupancy (Gvt. Exs. 2, 3, 4, 5A, 6, 7, 8, R. 461–478, 498–507), the estimated fair and reasonable cost of painting and otherwise repairing and restoring the building, building equipment, power plant and utility equipment to first-class condition (R. 478–483, 491–496, 507–510, 520, 531, 544, 548, 601–608, 611–620; Govt. Ex. 17, R. 636–640; see also R. 690–692), and the estimated fair and reasonable cost of repairing, replacing and moving back into their original position all laundry and dry-cleaning machinery and equipment so that the plant would be in a good and efficient operating condition (Govt. Exs. 10, 11, 12, 12A, 21, R. 549–567, 571–572, 647, 649–655). The total sum for repairing the building, building equipment and power plant equipment was $37,521.34 (see R. 633, 640, 690–692), and the total sum for the repairs to laundry and dry-cleaning equipment was $20,471.27 (see R. 631–632, 645), making the cost of all repairs $57,992.61 (see R. 633, 690–692). Appellant's objections to the Government's testimony and exhibits relating to this subject made on various grounds were overruled (R. 504–505, 555–556, 631–632, 634–635, 646–648).

On rebuttal, Peter W. Dahlquist testified that he had examined the laundry and dry-cleaning equipment which Government witnesses had said could be repaired for the total sum of $20,471.27 and that in his opinion it would cost $34,309.42 to repair it (R. 809–812, 814; D. Exs. 48, 49, 50, R. 822–823). He further stated that his estimate of the cost of parts was very close to that testified to by the Government's witnesses but that there was a big difference between the amount allowed by him for the labor costs and the amount allowed by the Government witnesses (R. 817). Certain other evidence offered on rebuttal was excluded on the ground that it was not proper rebuttal (R. 826–830; 833–838, 846–849).

During the trial several exhibits prepared by certified public accountants from the books of the company, which were offered in evidence by the Fimball Laundry Company, were excluded. The excluded exhibits were as follows: Defendant's Exhibits 1 and 3, two compilations showing the disposition of the funds of the laundry company, one from 1924 through 1942, and the other from 1938 through 1942 (R. 188–191, 196–197, 200–201); Defendant's Exhibit 2, a compilation of the total cost of the company's fixed assets, i. e., real estate, building, machinery and equipment (R. 192–200); Defendant's Exhibit 4, showing the net profits of the company before and after deducting income tax and depreciation taken on income tax returns and also showing

the amount of income tax paid and the amount of depreciation taken on income tax returns from 1924 through 1942 (R. 201–204); Defendant's Exhibit 5, showing the net profits of the company from 1933 through 1942 before and after deducting officers' salaries, income tax and depreciation taken on income tax returns, the amount of the latter items, the surplus on hand January 1, 1933, the dividends paid from 1933 through 1942 and surplus on hand December 31, 1942 (R. 205–206); Defendant's Exhibit 6, containing a comparative balance sheet for the years 1923 and 1942 and showing, among other things, the percentage of officers' salaries to capital stock and surplus, the percentage of dividends to capital stock and surplus and the percentage of repairs to the accumulated cost of equipment from 1924 to 1942 (R. 207–218, 855–857); Defendant's Exhibit 7, showing the gross income of laundry from 1924 through 1942 (R. 219–221);[5] Defendant's Exhibit 13, showing the commissions and total salaries and commissions paid the drivers on the laundry routes (R. 243–244); Defendant's Exhibit 14, identified as "purporting" to evaluate the customers served by the laundry during

[5] In excluding Defendant's Exhibit 7, the trial court stated that it would be admitted if there were attached a statement of net earnings (R. 219–221). No offer of proof in compliance with this suggestion was made. Gross income for the years 1936–1942 was admitted elsewhere. See footnote 2, *supra*.

1942 (R. 368–370); Defendant's Exhibits 15, 16, and 17, showing the estimated operating losses which it was contended would occur during the first three years of operation after the Government surrendered possession of the plant (these losses represented the cost of rebuilding the trade routes) (Pet. 8) (R. 370–383); column 1 of Defendant's Exhibit 21, showing the original cost installed of all machinery and equipment (except power machinery and equipment) (R. 250–251, 257–260).

The trial court also rejected an offer to prove by witness A. L. Jacobberger that the value of the "Kimball Laundry Company" at the time of the taking "exclusive of the delivery trucks, exclusive of any element of good will, and exclusive of the loss of profits" was $987,524.32 (R. 315). The offer showed that this sum included the following items: $280,348 (value of building), $273,831.39 (value of machinery and equipment), $62,928.08 (value of power equipment), $30,000 (value of land), and $340,516.85 (value of trade routes as a capital asset evaluated by number of customers) (R. 316). Further offering to prove that the value of the property to the company upon its return by the Government would be $426,208.28, it was stated that the purpose of the offer was to show that the proper measure of damages was the difference between the foregoing alleged values

of the company before and after the taking or $561,316.04 (R. 316).

At the close of the trial, the court instructed the jury (R. 150–165) to the effect that the owner of property taken for public use is entitled to just compensation, i. e., the full and perfect equivalent in money for the property taken, that he is entitled to be put in as good a position pecuniarily as if his property had not been taken. After stating that in fee takings the measure of compensation is fair market value of the property taken and can be fairly easily determined, the court pointed out the difficulty of determining market value in temporary takings where there is no "market" price, and discussed the various items of evidence admitted which the jury was to consider in an effort to find a "yardstick" for measuring the fair and reasonable value of the use of the property. The court also instructed the jury that they were to determine the fair and reasonable value of the use of the property or annual rental (explaining that this value is sometimes called the value of the use and sometimes rental) and that, in addition, they should determine and award compensation for destruction, damage, or depreciation of the property. The jury was further instructed that since it had appeared on cross examination of some of the owner's witnesses who had given their opinions of the value of

the property that they had considered certain elements which were not proper, the testimony of those witnesses, insofar as the improper elements were concerned, should be disregarded (R. 156–157, see also R. 167).

Petitioner objected to the instructions to disregard certain testimony of its witnesses and objected generally because the instructions were not explicit enough with regard to the element of damages and because the use of the word "rental" by the court in the instructions was not proper and because here, as well as throughout the trial, the court failed and refused to recognize as an element of damage the destruction of the trade routes and customer lists (R. 165–166). Specific exceptions were taken (R. 166) to all instructions given as requested by the Government (see R. 163–165, 169–172) and to the failure to give instructions requested by petitioner (see R. 172–178).

The jury returned its verdict on March 20, 1946, awarding a total sum of $297,776.03 for the taking of the property for a term beginning November 22, 1942, and ending June 30, 1946, and including compensation for failure to return the property in the condition it was in on November 22, 1942 (R. 95–96). Special findings were made fixing the annual compensation payable at $70,000, making the total rental for the entire period of 3.6 years the sum of $252,000 and

fixing the amount payable for failure to return the property in the same condition as when taken in the sum of $45,776.03 (R. 96).

A motion in arrest of judgment filed March 27, 1946, was overruled (R. 97–101; see R. 107). On April 9, 1946, judgment was entered in the amount of the verdict and interest at 6% was awarded from November 22, 1942, on the amount due for the rent or use of the property for the period November 22, 1942, to June 30, 1943, until paid and on the amount due for each subsequent yearly period from the beginning of such period until paid, giving credit from time to time for the sums deposited as estimated compensation when declarations of taking were filed (R. 101–107). Interest was also awarded on the sum of $45,776.03, the jury's award for failure to return the property in the same condition as when taken, from March 20, 1946, the date of the verdict, until paid (R. 105).

On March 23, 1946, the United States surrendered possession of the property to the Kimball Laundry Company (R. 97). On June 11, 1946, the United States deposited in court $98,124.27, the amount remaining due to satisfy the judgment (see R. 138).* Upon application, the Kimball

*The judgment reserved jurisdiction in the trial court for any additional claim which might arise by reason of an extension of the time beyond June 30, 1946, or by reason of any additional damage to the premises occurring after the verdict and prior to surrender of possession (R. 106). However, on

Laundry Company was permitted to withdraw $75,000 of this sum, the order allowing the withdrawal stating that it was without prejudice to the company's right to appeal (R. 137–140).[7]

A motion for new trial filed April 19, 1946 (R. 107–126), was denied on August 16, 1946 (see R. 140).

Upon appeal by petitioner to the United States Court of Appeals for the Eighth Circuit, the judgment was affirmed, the court holding that the United States had not taken the Laundry Company's business, trade routes or customers, that while the Government's occupation of the plant undoubtedly disrupted and damaged the company's business such damage is not compensable under the Fifth Amendment (vol. IV, pp. 8–10). Pointing out that, even if the taking of the temporary occupancy of the laundry were to be given

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May 8, 1946, the parties entered into a stipulation fixing the sum of $18,089.55 as the amount to be paid by the Kimball Laundry Company for certain machinery and parts owned by the United States and desired by the company, and agreeing that the sum of $200 covered in full any and all claims of every kind and nature for damage caused to the premises by the United States from and after March 20, 1946, and prior to the date of surrender of possession (R. 134). It was further agreed that $200 with interest until paid should be added to the judgment and that $18,089.55 should be credited to the judgment as if paid in cash on March 23, 1946 (R. 135). Judgment was entered on the stipulation on the same day (R. 136–137).

[7] On September 30, 1948, the district court, upon motion by the Company, permitted the withdrawal of an additional $20,000 from the sum deposited to satisfy the judgment.

the legal effect of the taking of fee title, damage to the company's business would not be compensable, the court held that what was taken in the instant case was the temporary use and occupancy of the laundry, that just compensation for the right to use and occupy property temporarily is the value on the market of the use and occupancy, together with compensation for any destruction, damage and depreciation in value of the property occasioned by the temporary use and does not include business losses (vol. IV, pp. 8–10). The court also held that interest on the award had been properly computed (vol. IV, pp. 13–14).

SUMMARY OF ARGUMENT

I

The Government here condemned the temporary use of the laundry plant, including land, buildings and equipment. It is well settled, as the courts below held, that just compensation for such a taking is measured by the market rental value of the temporary occupancy taken. In addition, compensation must be paid for the failure of the Government to return the property in the same condition as when it was taken, ordinary wear and tear excepted. The present case was tried in accordance with these principles which have emerged from long experience as fair and just guides for the determination of the governmental obligations flowing from an

exercise of the power of eminent domain. Petitioner apparently argues that its compensation should be determined either by the full fee value of the property or by the difference between such value at the time the property was taken and the time of its return to petitioner. But since the United States did not take the property absolutely, petitioner plainly is not entitled to recover its fee value. Petitioner's advocacy of the "before and after" measure of just compensation is put forward in the instant case only as a means of inclusion in the judgment of an award for the alleged taking of its "trade routes". We shall show in point II that the courts below properly excluded evidence relating to the trade routes. In any event, petitioner's "before and after" theory of valuation would make compensation depend on fluctuations in the market which, very often, would have no relation whatever to the value of the use taken.

II

Petitioner's real contention is that its trade routes, i. e., the patronage of its customers, were taken and the value thereof should have been included in the award. The evidence which was excluded by the trial court was offered to support this claim. The courts below were correct in holding that this constituted simply an attempt to recover for a business loss which is not allowable in this proceeding.

A. It is well settled that business injuries, such as loss of profits and damage to good will, are like other consequential losses resulting from the taking of private property for public use, and may not be considered in determining the compensation payable under the Fifth Amendment. Just compensation is the value of the interest taken.

B. It is plain that the Government had no interest in and did not take the company's business, trade routes or customers. It simply took the physical properties. That thereby petitioner's business may have been disrupted or injured does not mean that the business was taken. *Omnia Co.* v. *United States*, 261 U. S. 502; *Mitchell* v. *United States*, 267 U. S. 341. A conclusion that petitioner was injured through loss of patronage can be based not on any factual evidence presented by petitioner but on sheer speculation as to conditions at the time of return of the property.

C. The fact that in the instant case the property was taken temporarily rather than permanently does not change this result. In *United States* v. *General Motors Corp.*, 323 U. S. 373, this Court, while holding that when a part of a condemnee's interest is taken, the necessary cost of moving, storing, and returning personal property located in the building taken temporarily might be considered, in the peculiar circumstances of that case, in determining market

price for the temporary occupancy, also held that, as in the case of fee takings, proof of value peculiar to the owner, such as the value of good will or of injury to the condemnee's business, must be excluded. There is no warrant for the allowance of such business losses in a condemnation proceeding. The value of a business or its good will is attributable to many varying and speculative factors, such as skill of management, the nature and extent of competition, and general business conditions, among other things. Such value is highly speculative and should have no part in the determination of the value of what was actually taken, i. e., the physical property.

In the instant case, petitioner was permitted to introduce all relevant evidence relating to value of its plant and the fact that it had a profitable business located on the property. The claim for loss of trade routes constituted simply an attempt to recover for injury to good will or business loss and was properly rejected.

D. The evidence relating to petitioner's good will value ("trade routes") reflects the typically speculative nature of such value.

III

Other alleged errors specified as grounds for reversal are without merit.

A. The qualification of witnesses to express an opinion of value is a matter within the discretion of the trial court and its decision is conclusive unless there has been an abuse of

discretion. No abuse of discretion can be shown here.

B. Admission or exclusion of rebuttal testimony is a matter within the discretion of the trial court and its decision will not be reversed in the absence of a clear abuse of discretion. There was no abuse of discretion here.

C. When property is taken prior to payment therefor, interest is allowed as part of just compensation from the date of the taking until payment. Here, the property was taken for a specified term with the option to renew the term for additional yearly periods. The option was exercised from time to time thus extending the term from year to year. Since the taking was one of yearly periods and since the jury awarded compensation on a yearly basis, interest was properly computed on the sum allowed for each period from the beginning of the period until paid. The Declaration of Taking Act does not require a different result. Compensation for the failure to return property taken temporarily in the same condition as when taken, ordinary wear and tear excepted, is not due until the property is returned. Interest on the sum awarded for that purpose does not begin to run until the date of return. Since interest is not allowable when just compensation is fixed by agreement of the parties, petitioner's claim to interest with regard to certain supplies was properly disallowed.

ARGUMENT

I

THE PETITIONER HAS RECEIVED FULL AND ADEQUATE COMPENSATION FOR THE TEMPORARY USE OF THE PROPERTY, UNDER ESTABLISHED RULES PROPERLY APPLIED BY THE DISTRICT COURT

By every objective test, petitioner has received fair and adequate compensation. It has obtained, after the three years and seven months of use of its plant by the United States, a sum almost half the total market value of the fee title (according to petitioner's own estimates)—plus the return of the entire property. The award was based on the market rental value of the plant (including equipment), plus an allowance to restore the property to its original condition, and was thus completely in accord with established authority. It has long been held that the measure of compensation for the taking of a temporary interest in property such as was taken here is market rental value. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382, 383; *Phelps* v. *United States*, 274 U. S. 341, 342–343; *Kansas City Southern Ry. Co.* v. *Commissioner of Internal Revenue*, 52 F. 2d 372, 379–380, 381 (C. C. A. 8), certiorari denied, 284 U. S. 676; *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.); *Johnson* v. *United States*, 2 C. Cls. 391, 415–416,

419; *Johnson* v. *United States*, 4 C. Cls. 248, 251; *Pope* v. *United States*, 26 C. Cls. 11, 13. Such a measure has been applied almost universally by the district courts in the many recent cases arising during the war where the Government condemned only the temporary use of property which would not be needed thereafter. *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005 (D. Del.); *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *7.41 Acres of Land in Camden*, 63 F. Supp. 43, 47 (D. N. J.); *United States* v. *40.558 Acres of Land in New Castle County*, 62 F. Supp. 98 (D. Del.); *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (D. Del.); *United States* v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *5.741 Acres of Land in Flushing & Arde Bulova*, 51 F. Supp. 147, 148 (E. D. N. Y.).[8]

[8] The only cases found in which the courts have departed from the standard of market rental value are cases relied upon by petitioner (Br. 123–124). *United States* v. *9.94 Acres of Land in City of Charleston*, 58 F. Supp. 478 (E. D. S. C.) stands alone against the great weight of authority and its reasoning has been specifically rejected in subsequent decisions. E. g. *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.). In *United States* v. *Bauman*, 56 F. Supp. 109 (D. Ore.), also relied upon by petitioner (Pet. 59; Br. 124), the United States filed a petition in 1942 to condemn a term for three years with the right to cancel at the end of any year. The court merely held that

The value of a temporary interest is thus variously spoken of as "the market rental value of the temporary occupancy taken," *United States* v. *General Motors Corp.*, 323 U. S. 373, 382–383, "the fair market value of the use," *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005, 1008 (D. Del.), or more frequently the convenient designation of "fair annual rental" is used. *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389 (D. Del.). In temporary takings, as well as in fee takings, there is sometimes no "market" for the property taken. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378. But "where, for any reason, property has no market, resort must be had to other data to ascertain its value * * *." *United States* v. *Miller*, 317 U. S. 369, 374. As the court said in *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (D. Del.), "Certainly an expert appraiser can determine

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the United States could not amend its petition and file a declaration of taking to acquire a term for one year with a right to renew for additional yearly periods for the duration of the national emergency without including compensation in its deposit for the value of the right of renewal. In *11,000 Acres of Land in Smith County, Tex.* v. *United States*, 152 F. 2d 566 (C. C. A. 5), certiorari denied, 328 U. S. 835 (see Br. 123), the court recognized and followed the general rule in valuing the fee owner's interest, but because of the peculiar nature of an oil and gas lease, held that a different measure must be applied to determine compensation for the lessee's interest.

a fair annual rental, determined as though the government had rented the property for a year with an option to renew from year to year * * *." Thus, as will be shown, *infra*, pp. 32–34, expert witnesses in the present case gave their opinions as to the value of the use of the property or the fair annual rental and "other data" was admitted as bearing on the value of the temporary interest taken.

In addition to the market rental value of the property during the period of the temporary taking, the award in such cases must include an allowance to enable the return of the property in as good condition as when the United States took possession, ordinary wear and tear excepted.[9] This principle, which was followed by the courts below, is well established. *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.); *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 263 (D. Md.); *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005 (D. Del.); *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, 53 F. Supp. 767, 770–771 (N. D. Cal.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389 (D. Del.). If by reason of the use made of the premises by the

[9] Compensation for ordinary wear and tear is included in fixing market rental value.

United States, they are damaged beyond ordinary wear and tear, the owner is entitled to compensation for the damage so caused. Compensation for this type of damage is generally determined by reference to the difference between the market value of the property in its condition before and after the taking. See, e. g., *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, 53 F. Supp. 767, 770–771 (N. D. Cal.). When, as here, the damage results simply from heavy usage and from the change in location of machinery, the difference in market value caused by the Government's use of the property is generally shown by the cost of restoring the property to its former condition. E. g. *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.).[10]

[10] As will be noted from the cases cited above, there is a divergence of opinion among the lower federal courts as to the time when compensation for damage resulting from the use of the property is to be determined. One view is that, if the owner so desires, it should be determined at the time of the trial even though the amount of the damage may be speculative at that time. *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, *supra*. Another is that the trial court should retain jurisdiction to determine such compensation when the property is returned. *United States* v. *Certain Parcels of Land in Baltimore*, *supra*; *In re Condemnation of Lands for Military Camp*, *supra*. And a third view is that this compensation cannot be determined and awarded in the condemnation proceeding, but must be recovered in a separate suit brought for that purpose after the property is returned. *United States* v. *14,475 Acres of Land in Christiana Hun-*

In the present case evidence was admitted showing both the market rental value of the property for the period taken and the amount of damage resulting to the property from the use made of it by the Government. Expert witnesses for both sides testified to the total sum which, in their opinions, the owner was entitled to recover and explained how they arrived at the sums testified to. An examination of the testimony shows that the methods used by the Government's witnesses and by those of petitioner in arriving at their total estimates were similar. Both allowed various amounts for the rental value of the property (R. 320, 424–425, 456, 728–737, 768–778).[11] The

dred, supra, and cases cited therein. It is immaterial for present purposes which view is correct since the trial occurred at a time when it was known that possession would be surrendered within a very short time. The issue as to the amount of compensation for damage to the property resulting from the Government's use up to the time of the trial was submitted to the jury without question by both parties and compensation for damage occurring after the trial and before possession was actually surrendered, was included in a supplemental judgment upon stipulation by the parties (R. 134–137). The amount of both judgments has been deposited in court (R. 138).

[11] Petitioner's witnesses referred to this sum as the amount which it was "entitled to for the use and occupancy * * * based on my knowledge and talking with real estate men who are in the business of investing money for the use of that kind that are rented * * *" (R. 320), the amount "the use of the plant per year was worth * * * over and above the amount of the damage to the building and machinery and equipment" (R. 424–425) and "the fair value for the temporary use" (R. 456). The Government's witnesses referred

items included by both in computing the fair rental value were taxes, insurance, normal depreciation and a net return on investment, i. e., a net return on the value of the physical assets (R. 320–321, 324–325, 332–334, 351–353, 456–458, 728–737, 769–770, 777–778). Other evidence admitted on behalf of petitioner as bearing on the value of the use of the property was the original cost of the land and building, the value of the land in November 1942, the reproduction cost of the building in November 1942, and the value of the machinery and other equipment in November 1942 (R. 258–264, 270–273, 314, 385–386, 389).

In addition, witnesses for both parties allowed various sums for damages to the property resulting from its use by the Government (R. 319–320, 343, 345, 424, 456). The latter sums were sometimes referred to by the petitioner's witnesses as the amount necessary to repair and replace parts of the building, power plant, machinery and equipment (R. 345, 424, 456). At other times, petitioner's testimony and exhibits referred to these sums as representing the cost of putting the building back in the condition in which it was in 1942 (see R. 304–306), and the difference between the value of all machinery and equipment (including power equipment and laundry and dry cleaning equipment) before the taking and its

to it generally as "fair annual rental," "estimated fair rental," or "use value" (R. 729–730, 735–736, 771).

value at the time of the trial (see R. 260, 272–273). The amount allowed by the Government's witnesses for damages resulting from the use of the property was included in their estimates of fair annual rental as depreciation due to abnormal or excessive use of the property (R. 730–732, 771). To this was added a lump sum computed at the time of the trial for the actual cost of restoration and repair not included in the abnormal depreciation allowance (see R. 735–737, 777–778). Other testimony was also introduced by the Government as to the cost of repairs and restoration (see R. 557–567, 631–633, 647–655, 690–692).

After instructing the jury generally as to the meaning of just compensation, i. e., that it meant that the owner should recover the full and perfect equivalent in money of the property taken and that the owner was to be put in as good a position pecuniarily as if his property had not been taken, and that the measure of just compensation is the fair market value of the property at the time of the taking, the trial court pointed out that while the standard of fair market value works very nicely in cases of fee takings, it is much more difficult to apply it in cases of temporary takings because, as a general rule, as in the instant case, there is no market for the property for a temporary use (R. 150–153; see also R. 154, 162, 164).

As the court stated, "There is no evidence of any laundry having been sold on the market. That being so, you have to begin to look around to find another 'yardstick'" (R. 153). Continuing, the court commented on some of the evidence admitted for the purpose of showing the fair rental value or value of the use of the property for the period taken and the principles applicable in arriving not only at that value but also in arriving at the amount of depreciation (R. 154-161), pointing out that if depreciation for ordinary wear and tear was included in fixing the rental for the use of the property it should not again be included in the damages awarded to repair or restore the property (R. 158). The court further instructed the jury to bring in a general verdict fixing a lump sum covering both the value of the use of the property and the damages to the property and to make special findings (1) as to the amount allowed as "annual rental or the amount that you determine for the use of the property per annum" and (2) as to the compensation payable for failure to return the property in the condition it was on November 22, 1942 (R. 161).

Thus, it appears that evidence was admitted and the jury was instructed in accordance with principles generally applicable to takings of this kind. Although the court below observed that the trial court's charge was not a model of conciseness

or accuracy, it is submitted that, as that court said (R. 11, vol. IV):

> Taking the charge as a whole * * * it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry.

But we believe that a fair distillation of petitioner's thirty-two points relied upon for reversal (Br. 34–108) is its contention that it is entitled to the inclusion in the award of the value of

its trade routes, i. e., the patronage of its customers. While it makes and could make no contention that the Government has taken its customers, petitioner does contend that they have been lost to it and that that loss should be compensated. We deal directly with that contention in Point II of our Argument, *infra*, pp. 41–46. But because petitioner, in the course of making that argument, appears to reject the rental value of the use of its facilities as the applicable measure of compensation (Br. 30–31, Pt. XV; Br. 116–117, par. 13; Br. 123–128), we have endeavored to show that petitioner has been fully compensated under that settled rule of compensation, a rule which has grown out of and survived the test of experience in cases of this sort.

On this phase of the case, petitioner states that its laundry plant was "totally taken" on November 21, 1942 (Br. 2; cf. Br. 125), and that the plant was declared surplus and abandoned on March 22, 1946 (Br. 2, 5–6, 125). The argument apparently made is that the measure of compensation is either the full fee value of the property or the difference between the fee value at the time of the taking and at the time of its return to the laundry company (R. 27–31, 91–93, vol. IV, p. 8; Br. 27, Pt. VIII; Br. 31–32, Pt. XVI; Br. 123–128).

In making these contentions, petitioner endeavors to rely upon the Act of October 16, 1941, 55 Stat. 742, as amended by Title VI of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 181, secs. 601–602, as amended; 50 U. S. C. App. (1940 ed.) Supp. V, secs 721–722 (Br. 3, 32–33, 124; App. pp. 8–13). That Act authorized the President to requisition personalty for military or naval purposes (i. e., equipment, supplies or munitions and machinery, tools or material necessary to manufacture, service or operate such equipment, supplies or munitions). It provided the means for determining the just compensation to be paid for the property requisitioned and further provided for the return of the property to the former owner if he desired it upon payment of its fair value as of the date of the return. That statute has no application here, and could hardly justify the petitioner's contentions even if it had. The authority to acquire real property together with personal property located thereon or used therewith is found in Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, sec. 171a.

It was under the Second War Powers Act that the present proceeding was instituted at the request of the Secretary of War (R. 1). By that Act, Congress expressly authorized the taking of temporary occupancy rather than the fee title.

Since the administrative determination to do so was not arbitrary or capricious it is binding upon petitioner. *United States v. Carmack*, 329 U. S. 230. Obviously no justification can be given for compelling the United States to pay the fee value of the property when it has only taken that limited interest and, thereafter, returned the property to the owner—property which, according to petitioner's own estimates, was worth $400,000 on the date of return (R. 315–316).

It is rather paradoxical that petitioner makes the alternative contention that the measure of compensation is the difference between the value of the property at the time of taking and at the time of its return. Under such a formula the owner whose property is taken temporarily might receive no compensation for its use. Thus, if the property were returned in much the same condition as when it was taken and the market were a stable one, he could conceivably be entitled only to depreciation. Insofar as the "before and after" formula depends upon market fluctuations rather than depreciation of the property it will make the award for temporary use depend upon what may often be a wholly irrelevant factor. Indeed, in the instant case the "before and after" theory, advocated by petitioner, if applied with proper regard to the items which are compensable, would result in a lesser award than the verdict. Peti-

tioner contends that its loss is $592,567.04 (Br. 12). But this computation includes an award of $340,516.85 for loss of trade routes, an item which is not compensable (see point II, *infra*, p. 41). If this item is excluded the total award on petitioner's theory, and based on its own figures, would be $252,050.19 as opposed to the verdict of $297,776.03 or $45,725.84 less than the amount awarded.[12] It is thus apparent that petitioner here advocates the before and after theory only as a device to include the alleged loss of trade routes in the award.

Petitioner also asserts from time to time that the trial court allowed it to recover only "interest" on the appraised value of the property (Br. 2, 14, 17, 27, 30, 121–123; see also R. 7, vol. IV). As pointed out above (pp. 32–33), one of the items considered by witnesses for both the owner and the Government in computing compensation for the use of the property or fair annual rental was a fair return on the value of the property

[12] For purposes of this illustration, we have taken the figures set out in the petitioner's brief (p. 12). In fact, the offer of proof of "before and after value" alleged a total loss of $561,316.04 (R. 316) rather than $592,567.04 stated in the brief. This difference of $31,251.00 is due to the fact that the computations in the brief are based on various bits of evidence, many of them excluded rebuttal testimony, from which petitioner arrives at a value on date of return of $395,057.28, rather than the $426,208.28 stated in the offer of proof. Taking the figures of the offer of proof but excluding loss of trade routes, petitioner's loss would be $76,976.84 less than the amount awarded.

(R. 332–333, 457, 730, 735, 769). Thus, the court in its charge referred to "interest" on the value of the property as one of the "yardsticks" to be considered in arriving at an annual rental (R. 139). This "yardstick" was not only used by petitioner's witnesses, but petitioner did not object to the use of the term in the instructions. Rather it objected to the use of the term "rental" in the charge (see R. 165–166). Here again under the circumstances of the trial of this case, there could have been no misunderstanding by the jury.

II

THE PETITIONER, HAVING BEEN FULLY COMPENSATED FOR THE TEMPORARY TAKING OF ITS PROPERTY, IS NOT ENTITLED TO A FURTHER AWARD FOR LOSS OF GOOD WILL OR TRADE ROUTES. THE GOVERNMENT DID NOT TAKE PETITIONER'S GOOD WILL OR ITS TRADE ROUTES, AND THE COURTS BELOW DID NOT ERR IN HOLDING THAT EVIDENCE OF VALUE OF THE TRADE ROUTES WAS INADMISSIBLE

Petitioner's contention is that the courts below erred in not permitting it to recover for the alleged destruction of its trade routes (Br. 25–26). Petitioner asserts that it was "driven from business" (Br. 2, 25) and that its trade routes were "totally destroyed" (Br. 9, 25). Petitioner's protests, here and below, that this is not a claim for loss of profits, damage to good will or injury to its business (Br. 9–10, 134) amount to nothing

more than a quibble as to the definition of those terms.

At the trial petitioner sought to have A. L. Jacobberger testify to the value of "the Kimball Laundry *Company*,"[13] before and after the taking (R. 315–316). As the offer of proof shows, the testimony thus sought to be introduced was the "before and after" value of the land, building, machinery, equipment and the trade routes, the latter being "evaluated by numbers of customers of different kinds" at $340,516.58 (R. 316). Inasmuch as the "before and after" values of all items included in the offer of proof, with the exception of the trade routes, were admitted on behalf of petitioner elsewhere in the course of the trial (R. 260, 264, 273, 306, 330), it appears that in computing the total difference between the value of the laundry company before and after the taking, Mr. Jacobberger allowed for the complete destruction of the value of the trade routes (see *supra*, pp. 10–11, 17–18, and Br. 13). Petitioner also offered to prove the same value of the trade routes by an exhibit prepared by Harry E. Judd, a certified public accountant, who, it was said, would testify that he arrived at the conclusions of value shown on the exhibit in accordance with the standard method used by laundries in evaluating customers and trade routes and approved

[13] Italics supplied.

by the Board of Tax Appeals (D. Ex. 14, R. 368–370). It is contended that the trial court erred in excluding this and other evidence bearing on the value of the trade routes and in refusing to instruct the jury to consider their value (see, e. g., Br. 23–26, 113, 120–123, 127).

A. *Business losses are not compensable under the Fifth Amendment.*—It is well settled in the federal courts that business injuries, such as loss of profits and damage to good will, like other consequential losses resulting from the taking of private property for public use, are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Company*, 327 U. S. 372, 377–378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379–380, 383; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Bothwell* v. *United States*, 254 U. S. 231; *United States* v. *Beckstold Co.*, 129 F. 2d 473, 476 (C. C. A. 8); *Ralph* v. *Hazen*, 93 F. 2d 68, 70–71 (App. D. C.); *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5); *In re Post Office Site in Borough of The Bronx*, 210 Fed. 832 (C. C. A. 2); *United States* v. *Meyers*, 190 Fed. 688 (D. Conn.); *Lehigh Valley Coal Co.* v. *Chicago*, 26 Fed. 415, 417 (N. D. Ill.) As this Court said in the *Powelson* case, *supra*, at pages

281–282: "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken * * * not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." Accordingly, in the *Mitchell* case, *supra,* the owner was denied compensation for the destruction of his business which resulted from the taking of his land even though the business could not be re-established elsewhere. And in the *Bothwell* case, *supra,* the court held that there was no obligation on the part of the United States to pay the loss due to a forced sale of cattle at prices below their fair market value or for destruction of the business resulting from the taking.

This Court has recognized, as was pointed out in *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377, that by the denial of recovery for business and other consequential losses the owner often receives less than the value of the property to him or for his particular purposes, but as was also pointed out in that case, the just compensa-

tion guaranteed by the Constitution is nevertheless limited to "the value of the interest taken." This settled rule supplies a standard of objectivity essential to governmental administration in this field.

B. *Petitioner's business has not been taken.*—Contrary to petitioner's contentions, the fact that the value of petitioner's trade routes (business relationships) may have been injured, or even destroyed, does not mean that they have been "taken" so as to give rise to a right to compensation therefor. *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89–94; *Omnia Co.* v. *United States*, 261 U. S. 502. "Destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." *Omnia Co.* v. *United States, supra,* at page 508. In the latter case, the claimant was the owner of a contract to acquire steel plate at a price under the market. The United States requisitioned the steel, thus destroying the value of the contract, but it was held that the contract had not been taken and that the owner was not entitled to be compensated for its loss. This Court said (p. 510) that "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. * * * If, under any power, a contract or

other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." Again, at page 513, the Court said: "The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things." Similarly, in *Mitchell* v. *United States*, 267 U. S. 341, 345, it was held that the destruction of a business caused by taking the land on which it was carried on was not a "taking" of the business.

Cases like *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, and *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, relied upon by petitioner (see Br. 109–117), do not establish a contrary rule. In the *Brooks-Scanlon* case, *supra*, the United States took a contract for the construction of a ship. As the Court said (p. 120), it "put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would

have had." Consequently, it was held (pp. 123–124) that the measure of compensation was "the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder * * *." In the *Monongahela* case, *supra*, the United States took a lock and dam constructed at the invitation of the United States and under a franchise from the State of Pennsylvania. As this Court has since pointed out, it was there held that the franchise was "an integral part" of the property so that it was taken when the property was taken and its value was required to be included in the compensation payable. See *Omnia Co.* v. *United States*, 261 U. S. 502, 513.[1] Here, the United States did not take petitioner's trade routes. It took the laundry company property, not to go into the laundry business in Omaha, but merely to perform a necessary function in the

[1] Moreover, as has been pointed out in subsequent cases, the decision rested primarily on estoppel. *Omnia Co.* v. *United States*, *supra*, at pp. 513–514; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282, footnote 12. The result reached in the *Monongahela* case appears highly questionable, and in any event should not be extended to the instant situation, which is clearly distinguishable. *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (C. C. A. 2), relied upon by the petitioner (Br. 109, 116), follows the view that there was a taking of a public utility's franchise and hence the taking of property for which compensation must be paid, and, like *Monongahela*, is readily distinguishable.

prosecution of the war, that of providing laundry and dry-cleaning services for the members of the armed forces. It did not put itself in the shoes of the Kimball Laundry Company, nor did it attempt to take advantage of that company's trade routes by serving its customers. As the court below said (R. 8, vol. IV):

> * * * The Government took exactly what it purported to take, namely, the temporary use and occupancy of the Company's laundry. The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes, or customers. No doubt the Government's occupation of the plant disrupted and damaged the Company's business, although it could hardly have destroyed the demand for laundry service in the city of Omaha or disabled the Company from ever re-establishing its business. * * *

This statement of the court below may, indeed, reflect an overly generous appraisal of the petitioner's evidence. Petitioner offered to prove that the taking in 1942 disabled it from serving its customers (R. 437–438). Also, it offered computations by an accountant prepared in 1943 representing operating loss for the three years "commencing from date plant was taken to re-establish condition existing November 21, 1942" (R. 370–382). But as the court below pointed out, the

Government's occupation did not disable the Company from re-establishing its business when the property was returned in 1946. It cannot be assumed that the demand for laundry service in Omaha was any less in 1946 than it was in 1942. Any extra expense which might be incurred in securing the return of petitioner's old customers or of securing new customers would depend on many factors such as the population of Omaha, general business conditions, the price situation, the ability of the personnel of the Company and many similar factors which might indeed result in a better business situation in a short time after return. Thus, a conclusion that petitioner has been injured by loss of patronage of its customers could not be based upon any factual evidence proffered by petitioner but purely on speculation as to various factors relating to its business prospects in 1946.

C. *This case presents no exception to the rule that business losses are not compensable.*—While petitioner apparently contended in its petition for certiorari (Pet. 33) that because it was the fee owner of a laundry which was a going business and because the Government took only a temporary use, the foregoing well-established principles do not apply and that a novel question is presented, petitioner now seems to contend that the same principles apply whether the Government takes a temporary use or an absolute fee title

(Br. 111) and that the question presented is whether the Government may avoid payment of compensation for its trade routes by taking a temporary use rather than the fee (Br. 116–117, see also Br. 112). Whatever the precise nature of the question sought to be presented, petitioner's contentions were answered in *United States* v. *General Motors Corp.*, 323 U. S. 373. In that case, this Court said (p. 382):

> * * * Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.

Continuing (p. 382), this Court said that it was "altogether another matter when the Government does not take the citizen's entire interest, but by the form of its proceeding chops it into bits" and held that in the case of temporary takings certain

necessary costs incurred by the condemnee, such as the cost of removal of personal property, its storage and return, should be considered in determining the market price for the temporary occupancy. However, it was further held (p. 383), that "Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning."

Thus, although the result of the *General Motors* case was to allow compensation for items previously regarded as non-compensable, the holding was an exceedingly narrow one (*United States* v. *Petty Motor Co.*, 327 U. S. 372), and the Court expressly preserved the rule prohibiting compensation for consequential damage, and in particular in respect of business losses and damage to good will. Petitioner seeks to extend the result of the *General Motors* case to include the very things which the Court specifically stated could not be included. The necessary expenses incurred as a result of having to remove personal property from the premises and subsequently return it represent an actual outlay of money due to the temporary taking of the building in which it was located. Even so, the Court did not allow these expenses *as such*, but only as reflected in the rental value allow-

able. Moreover, while the ascertainment of the amount of such expenditures may involve substantial difficulty, they may ordinarily be determined with some degree of accuracy and their reasonableness verified. "Good will,"[10] on the other hand, represents an intangible asset, the value of which depends upon many varying and speculative factors. Inasmuch as the value of "good will" has never, so far as is known, been awarded as part of just compensation for the taking of property under the power of eminent domain, no criterion for measuring its value is found in the eminent domain cases. However, turning to other fields where good will must sometimes be valued, we obtain some indication of the elusive and complex problem presented and can see how remote such value is from the value of what was taken; i. e., the physical property, and how dependent it is upon speculative elements which should have no part in determining just compensation for the physical property.

The value of the good will of a business includes the full value of the *enterprise* in excess of the value placed on the tangible property. II Bonbright, Valuation of Property (1937), pp. 727–734, 756. Although, as Bonbright points out (pp.

[10] As will be shown, *infra*, p. 59, the value of petitioner's trade routes is the same as the value of "good will" which in turn is synonymous with the value of the business as distinguished from the value of the physical property.

727-728), "good will" may properly be given a restricted meaning; i. e., that it is "the probability that old customers will return to the old stand," it is generally thought of as "the whole complex of intangibles—the attitude and economic condition of old and new customers, the relations, legal and nonlegal, to employees and sources of supply, the quality of management, the ability of the organization to produce and market efficiently, the existence and character of competition, general business conditions and prospects, sometimes franchises, patent rights, etc.—which will enable the going concern to yield high earnings." All of these speculative elements enter into the value of the good will of the Kimball Laundry Company as an *enterprise* at the date of the taking of the physical plant.

But the *enterprise* was not taken. The Company kept its name, its books and its lists of customers. As the court below said (R. 8, vol. IV), the taking could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business. The time it would take to rebuild its patronage and the extent to which profits would be lowered during that time would depend upon the demand for laundry service in Omaha, the economic conditions, the kind and amount of competition, the skill of the managers and personnel, etc. Clearly, none of these influences on

the value of the enterprise, whether favorable or unfavorable, could be attributed to the temporary taking by the Government. See *supra*, p. 49.

Petitioner has been paid for the use of its property during the temporary occupancy and the property has been returned, together with payment of the amount necessary to restore the property to the same condition it was in when the Government acquired it. The amount allowed—market rental value—*includes* an objective allowance for the income-making potentialities of the property in the form of a fair return on the value of the property. Anything additional would be unjustified. There is no more reason to compensate petitioner for any specific business losses which may be suffered while it re-establishes its enterprise than there is to compensate the fee owner whose entire property interest is taken and who must acquire new premises and re-establish his business elsewhere or who must start up a new business if, as in *Mitchell* v. *United States*, 267 U. S. 341, 343, the same business cannot be re-established elsewhere. In fact, the allowance of the Kimball Laundry Company's claim in this case would be demonstrably unjust. On the basis of the company's own estimates of value, it would have been entitled to recover only $600,000 to $650,000 (R. 423–424, 457) if the Government had taken a fee simple estate and would have recovered nothing for any business losses. Since the Govern-

ment took only a temporary use of the property the jury awarded the company approximately $300,000, of which $252,000 represents compensation for the use of the property during the Government's occupancy (R. 95–96). This sum, computed at the rate of $70,000.00 per year (R. 96) is more than the net income of the laundry for any year in the past 19 years with the exception of 1930 (see Def. Ex. 4, col. 2, R. 204). In fact, it is almost twice the company's average net income for the last 5 complete years of operation prior to the taking (1937–1941). The property has been returned to the company, together with payment for damages caused by the Government's use. While petitioner may not agree with the amount awarded by the jury for the latter item, it represents the sum which the jury found would place it in the same position so far as the physical property is concerned as when the Government took possession. Yet, petitioner claims an additional sum of $340,516.85. (R. 316; Br. 12) for alleged destruction of the value of its trade routes, which when added to the $252,000 awarded for the use of the property amounts to $592,516 and is the approximate equivalent of the fee value of its property when it still has the property (which according to petitioner's own figures (R. 316) was worth over $400,000 when returned), to do with as it wishes, either to sell it or to go back into the laundry business.

Apparently on the theory that taking part of the owner's estate is similar to taking part of the tract of land, petitioner also relies upon the so-called "severance damage" cases (Br. 117–121). The rule laid down in that line of cases was recently summarized as follows in *United States* v. *Miller*, 317 U. S. 369, 376: "If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage." The "severance damage" theory cannot be used as a device to recover business losses. As we have shown, *supra*, pp. 43–46, the fact that a taking of the owner's property results in a destruction of his business does not give rise to a right to compensation for the business. This rule is applicable not only where all of the property is taken but also where part has been taken. Thus, in *Ralph* v. *Hazen*, 93 F. 2d 68, 70–71 (App. D. C.), where part of a tract on which was located a garage was taken, it was held that damages to the garage business could not be included in determining the compensation to be paid. Similarly, in *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5), it was held that when part of a tract of land used for a brick manufacturing plant was taken, the fact that the plant was making money could be considered, but the business was not to

be valued as such, nor was any loss of profits to be compensated for." See also *Baetjer* v. *United States*, 143 F. 2d 391, 396 (C. C. A. 1), certiorari denied, 323 U. S. 772; *see United States* v. *7,936.6 Acres of Land*, 69 F. Supp. 328, 332 (P. R.).[18]

Petitioner's reliance (Br. 117–118) on *United States* v. *Chicago, B. & Q. R. Company*, 82 F. 2d 131 (C. C. A. 8), certiorari denied, 298 U. S. 689, is misplaced. Whatever the merits of that decision, it is clear that the court of appeals suggestion in that case that cases like *Gibson* v. *United States*, 166 U. S. 269, have been overruled

[18] Petitioner relies (Br. 117, 119, 121) upon *United States* v. *257.654 Acres of Land, Etc.*, 72 F. Supp. 903 (Haw.). That case is now pending on an appeal taken by the Government on the ground that it represents an improper allowance of business loss in the guise of severance damage. Moreover, even if the district court's analysis of the facts in that case is accepted, it does not support petitioner's claim. The court there held that the taking of certain physical property diminished the actual market value of other physical property not taken. As thus analyzed, the case presented the ordinary problem of severance damage. This has no application to the instant case where petitioner's claim is that the temporary taking of the physical property impaired the value of its trade routes. The value of the trade routes represents a mere expectancy of a continuing business relationship rather than any property right in the customers. Any injury to the trade routes would be a typical business loss which, it is well settled, is not compensable. This distinction between diminution in the value of physical property, on the one hand, and impairment of business expectations on the other has been precisely the line of distinction between that which is compensable and that which is not. Cf. *Baetjer* v. *United States*, *supra*, at pp. 395–396.

(82 F. 2d at 134–135), and that the words "or damaged" have now been added to the word "taken" in the Fifth Amendment (82 F. 2d at 139), cannot stand in the light of this Court's recent decisions. See, e. g., *United States* v. *Willow River Co.*, 324 U. S. 499, 502, 510. The opinion in the *General Motors* case, in any event, itself supplies sufficient answer to petitioner's argument. It was there said (323 U. S. at 379–380):

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of goodwill which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

While it is clear, as pointed out above, pp. 41–43, that in attempting to recover for the alleged destruction of its trade routes, petitioner seeks to

recover a business loss, its brief (pp. 9-10, 122) confuses the issue by denying that it seeks to recover for good will, loss of profit and loss of further business as it did in the trial court (see R. 315). Its theory seems to be that the value of trade routes does not represent good will, profits or other business value and that it is admissible as part of the composite value of the plant as a going concern (Br. 111, 114).

However, the very cases relied upon by petitioner as justifying the method used by its witness Judd in valuing the trade routes (R. 368–370) show that the value which it was sought to have the jury consider was the value of good will. In both *Appeal of Metropolitan Laundry Co.*, 2 B. T. A. 1062, and *Pioneer Laundry Co. v. Commissioner*, 5 B. T. A. 821, it was held that the value of good will acquired by the corporate taxpayer when it purchased another laundry should have been included in the computation of its statutory invested capital for income and profits-tax purposes. As appears in the opinions, good will consisted of the value of the drivers' routes and customer lists.

Petitioner emphasizes throughout that its laundry was a "going" business and attempts to distinguish certain of the cases holding that damages to a business are not compensable on the ground that they did not involve a "going" business (Pet. 35–37; see Br. 113–114). Petitioner's claim,

which is for the recovery of the value of its good will or the business, is to be distinguished from "going concern" value which under certain circumstances may be taken into consideration in valuing the property on the basis of reproduction cost. *Banner Milling Co.* v. *State of New York*, 240 N. Y. 533, 148 N. E. 668, certiorari denied, 269 U. S. 582; see Orgel, Valuation under Eminent Domain (1936), sec. 191. In the *Banner Milling Company* case, *supra*, the property taken had been used for a flour mill. It was held that the plant was to be valued "as a live, going flour mill" and, therefore, that in determining fair market value it was proper to consider, not only the cost of reproducing the physical plant, "but also the cost necessarily or reasonably expended in bringing the mill or factory into efficient working condition, which has been called the synchronizing of its parts." Consequently, architect's fees in making and revising plans and compensation for engineers to carry out the plans or to arrange the factory so as to produce appropriate manufacturing results, were held to be elements which should be considered in estimating the market value. However, these elements were carefully distinguished from the value of good will which, it was held, could not be taken into consideration. Similarly, in *Chicago* v. *Farwell*, 286 Ill. 415, 121 N. E. 795, the court held that value based upon the profits

derived from the operation of a soap factory could not be recovered under the guise of "efficiency" or "going" value.

All the evidence offered by petitioner as to the reproduction or replacement cost of the building, machinery, and equipment was admitted (R. 258–260, 264, 272–273).[9] The trial court also admitted much testimony as to the location, growth and expansion of the plant and its capacity (see R. 229–232, 265–266, 274–278, 386–388, 390–391), including the amount of laundry work done each year from 1932 through 1941 (R. 279–283), the gross receipts from the various types of laundry and dry-cleaning services rendered from 1936 through 1942 (R. 229–235, 238–242), the prices being charged for such services under O. P. A. ceilings in November 1942 (R. 295–297), and the total number of customers being served on November 21, 1942 (R. 235–237). Thus, while the trial court properly excluded evidence of the value of the business as such, it permitted petitioner to show how much business it had and that

[9] The "value installed" of machinery and equipment on the date of taking as shown on appellant's exhibits was based on the cost of replacing it with like machinery in the same condition and included installing it ready for operation (R. 246, 249, 270, 308).

It may also be noted that in spite of the Government's objection, reproduction cost of the building was admitted without requiring any deduction for depreciation (R. 262–263).

it was successful. Cf. *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5).[15]

Having admitted evidence of gross income and the like, it was proper for the court to instruct the jury that such evidence was admitted only to show that it was a going concern (R. 155, see also R. 229, 231–232, 236). Moreover, Harry Jacobberger, one of petitioner's witnesses when asked on cross-examination what elements he had included in valuing the use of the property, had said that he included "nothing but the rental of a business" and that the figure he had testified to was based on "the value that plant had to us as a going concern" (R. 426–427). Since it appeared that the witness, as petitioner does here, included the business value to petitioner within his definition of "going concern" value, the trial court properly instructed the jury that the going-con-

[15] In this connection, it should be noted that the trial court, in excluding Def. Ex. 7 showing the gross income of the company from 1924 through 1942, stated that the exhibit would be admitted if there were attached a statement of net earnings (i. e. after deduction of all expense of operation, salaries, etc.) (R. 219–221). No offer of proof in compliance with this suggestion was ever made. Petitioner's suggestion (R. 220) that its proffered Ex. 4 (R. 204) would suffice for that purpose was properly rejected by the court on the ground that it contained other items which "should not be in there" (R. 220). Moreover, the gross income from 1936 through 1942 was admitted in the form of yearly receipts for the various types of work done (Def. Ex. 10, R. 233–234). The totals appearing in the last column of Def. Ex. 10 are the same as the gross income for those years as shown on the excluded exhibit (see R. 221).

cern value sought to be placed on the property by the Kimball Laundry Company was not competent (R. 155) and that the element of going concern which Harry Jacobberger had stated he had considered on cross-examination should be disregarded (R. 156).

Finally, as this Court pointed out in *Omnia Co.* v. *United States*, 261 U. S. 502, 510, "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material." Hence, the fact that whatever business disruption there was resulted from the Government's need of its property for war purposes gives the petitioner no greater right to compensation than those who suffered similar losses because of governmental need for services of individuals or for raw materials upon which a business depends. Petitioner's claim based upon alleged loss of its laundry customers is even more remote than the actual contracts for future services or delivery for whose loss no compensation was permitted in the *Omnia* case. No proof is required that because of the exigencies of the recent war persons suffered many losses through frustration of their earning ability as individuals or through similar frustration of the ability of businesses to serve their customers. For example, substantial sacrifice in income was required of many persons who were drafted into the armed forces. Many busi-

nesses suffered like losses. In *St. Regis Paper Co.* v. *United States*, 110 Ct. Cls. 271, certiorari denied, No. 74, this Term, the Paper Company was compelled to shut down as a result of governmental restrictions upon the use of pulpwood. Nevertheless, the Company rather than the Government had to bear the loss caused thereby, which was claimed to be $376,754.86 out-of-pocket expense, $228,173.14 deterioration and depreciation charges, and $2,694,686.83 loss of profits.

We submit, therefore, that the courts below were clearly correct in concluding that business losses and injury to good will are not compensable and that the claim for the alleged value of trade routes is, in fact, simply a claim for such losses. With this exception, petitioner was accorded every opportunity to show the value of the plant and the fact that it had a profitable business located on the property.

D. *The evidence relating to petitioner's good will value ("trade routes") reflects the typically speculative nature of such value.*

The value of $340,516.85 claimed by petitioner for its trade routes appears to be computed by valuing each customer at an arbitrary figure (for example, $20 for each trade route customer) said to be based on trade practice (Br. 9).

Petitioner contends (Br. 8–10) that it has paid its "route men" during the six years previous to the taking a total of $237,654.83 in salaries and commissions, to establish its trade routes. It also

claims to have spent further sums—not specified—to build up its business (Br. 8). And it argues that after it reopens its laundry it will be compelled to incur net losses for the first three years, presumably by reason of expenditures incurred to regain its trade routes. (Br. 10.)

All these considerations are highly speculative. They are also highly detrimental to any rational program of land acquisition on the part of the Government. If as a result of a temporary taking the Government is to be compelled to reimburse a landowner for items of this kind, incurred in the normal course of operating a business, the budgetary consequences will be completely unpredictable. Before taking a particular piece of property the Government would be forced to analyze in detail the past business history of the property owner—as well as any expenses that he might consider necessary to incur at some future date when the property has been returned to him.

Petitioner's proffered evidence of good will value in support of its claim to approximately $340,000, in addition to the amount awarded it, should be considered in conjunction with an analysis of its own figures as to its actual net income. These income figures are not sufficiently detailed or pointed to permit an entirely reliable conclusion as to a fair capitalization of the value of petitioner's business. But they do raise serious doubts as to the validity of petitioner's good will value figures, and the inconsistency of results serves

to buttress the established view that good will value is so speculative as to make its inclusion in just compensation inadmissible.[19]

Thus, defendant's Exhibit 4 (R. 204) shows that for the last five years (1939–1941) preceding the taking, the average net income of the Kimball Laundry Company before deducting depreciation and income tax was $39,375.39 per year (see Column 2). If this sum is capitalized at six percent, the value of the entire enterprise, including the physical property and the business or good will, would be $656,256.50, which is approximately the fee value of the physical plant as claimed by petitioner (see R. 423, 424, 457). Obviously, if the physical property has the value claimed by petitioner, a net return of only 6 percent on that value leaves no room for any additional value for good will. If, on the other hand, it is assumed that the company had the good will which petitioner claims ($340,516.85),

[19] The fact that value based on the income includes the value of the business or good will which are attributable to numerous speculative elements such as the skill of management, the nature of competition and general business conditions is the primary reason for excluding evidence of income for the purpose of showing the fee value of property condemned. See Orgel, Valuation Under Eminent Domain, secs. 154, 158, 161, 173; 2 Nichols, Eminent Domain (2d ed. 1917), p. 1173; *Accounie Realty Co.* v. *St. Louis*, 347 Mo. 1224, 1227, 1229; *Matter of City of Rochester (Smith St. Bridge)*, 234 App. Div. 585, 587 (4th Dept.); *Sauer* v. *The Mayor*, 41 App. Div. 305, 308 (1st Dept.); *Gauley & E. R. Co.* v. *Cauley*, 84 W. Va. 489, 493; see also, *Talley* v. *Boston & Providence Railroad*, 182 Mass. 537, 539.

then the physical property could have no such value as that claimed by petitioner but would be approximately $315,739.65. Thus, it can be argued on the basis of petitioner's own figures either that the company had no good will or that petitioner is attempting to recover for it twice; i. e., by including it in its estimates of the fee value of the physical property and then adding it as a separate item to arrive at an alleged value of over $900,000 for the entire enterprise.

Moreover, in computing the rental value of the property, petitioner's witnesses felt that a return of 10 percent, or $65,000 should be allowed on the value which they placed on the physical property alone (R. 333, 457). If 10 per cent is considered a proper return and petitioner's estimate of the value of the physical property is accepted, the laundry company was not even making what would be considered a fair return on its property alone and there are no additional earnings representing a return on intangible assets such as "good will."

The correctness of petitioner's claim that its witness followed the method of valuing good will approved in *Appeal of Metropolitan Laundry Co.*, 2 B. T. A. 1062 and *Pioneer Laundry Co.* v. *Commissioner*, 5 B. T. A. 821, is doubtful. In those cases, the value was computed by multiplying the weekly receipts by the good-will value attributed to each dollar of receipts. But petitioner's witness, instead of using weekly receipts as a factor, substituted merely the total number of customers (R. 370). This process would seem to omit an essential element; i. e., the amount of receipts and profits for which each customer might be responsible.

We are not to be taken as contending that petitioner's enterprise possessed no "good will" in the ordinary sense. The above is offered, as we have said, simply to indicate the difficulties and doubts inherent in any attempt to evaluate good will in a condemnation case of this character.

It has already been pointed out (*supra*, p. 61) that the allowance for rental value awarded the petitioner in this case includes and reflects the fact that the property taken was used by a going concern. The generous extent of the award is indicated by the fact that a rental of $70,000 a year was allotted to the petitioner, as contrasted with the previous net annual average income of $39,375.39 referred to above. Petitioner has also received an award to restore the premises to their original condition. Under the Constitution, no more is required.

III

OTHER ALLEGED ERRORS SPECIFIED AS GROUNDS FOR REVERSAL ARE WITHOUT MERIT

A. *The trial court did not err in ruling that the Government's witnesses were qualified to testify.*—Petitioner states that certain of the Government's witnesses were not qualified to testify (Br. 26–27; see also Br. 16–18). These witnesses were C. R. Crowder, an engineer in the mechanical and electrical section of the United States Engineers Office in Omaha, who had had a great deal of experience in supervising and preparing estimates of the cost of constructing laundries and installing

and repairing laundry equipment, including the restgration of government-leased laundries elsewhere (R. 609–610, 658–661, 715); Cornelius G. Weber, an engineer and appraiser of wide experience, having been associated with the American Appraisal Company for 24 years and having appraised many industrial plants, including laundries (R. 722–723); and Lewis Sholes, a lifetime resident of Omaha, who had been in the real estate business for 46 years and in the appraising business for the last 20 or 25 years and who had appraised six other laundry plants in recent years (R. 760–761). Clearly, these witnesses, as the court below held (R. 12, Vol. IV) were qualified to estimate the rental value of the laundry, the damage to machinery and equipment and the cost of repairing and replacing it. Moreover, whether an expert witness is qualified to testify is primarily a question for the trial judge whose determination can be upset only for an abuse of discretion (R. 12, Vol. IV). *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 354; *Chapman* v. *United States*, 169 F. 2d 641, 645 (C. C. A. 10), certiorari denied, No. 375, this Term; *Love* v. *United States*, 141 F. 2d 981, 983 (C. C. A. 5). No abuse of discretion can be shown here. Under Crowder's supervision, Denton J. LaTurner and Ross I. Newcom, two engineers connected with the American Laundry Machine Company (R. 546, 571, 601) and A. J. Pargett, a construction engineer employed in the United States Engineers Office (R.

523) examined the machinery and equipment and jointly prepared exhibits showing the cost of repairing, replacing and relocating it (see R. 571–572, 583–584, 587–588, 599–601, 610–611, 619, 622, 630–631). Each of these witnesses, including Crowder, testified as to items which they had personally examined and Crowder gave the total of all items testified to (see R. 631–634, 647–648). Sholes together with petitioner's witness Goodwin examined the property in 1942 before the taking and made an inventory and appraisal at that time and also in 1945 (R. 246, 251, 771, 782–783). His inventory and appraisal were available to other Government witnesses who had not seen the property at the date of taking (R. 725). The former master mechanic of the Kimball Laundry Company accompanied Weber on his examination of the property and described the changes which had taken place in the condition of the machinery (R. 725). Floor plans showing the location of equipment at the time of taking and lists of items moved out of the building by the Government were inspected by the witnesses (Gov't. Ex. 9, R. 620–622, 634, 725). Thus, as the court below said (R. 12, Vol. IV), "The fact that many of the Government's experts on value or on damage to equipment and machinery had not seen the laundry in 1942 did not disqualify them to testify to their estimates of its value at that time. They had heard the condition of the plant and machinery fully described, and assumed that it was in either

good or first-class condition at the time the Government took over."

Finally, although petitioner states its objection to the testimony of Sholes and Weber in the form of an objection to their qualifications; the gist of the complaint is not their qualifications, but their method of valuation. That complaint is dealt with in Points I and II, *supra*.

B. *The trial court did not err in excluding rebuttal testimony.* Certain evidence offered by petitioner to rebut the Government's testimony as to the cost of restoring the building and some of the machinery to its former condition was excluded by the trial court on the ground that it was part of the Company's main case (R. 827–839, 833–838, 846–849; cf. Br. 138). The order of proof on a trial is largely in the discretion of the trial court. *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 462–463; *McClellan* v. *Hein*, 56 Neb. 600, 77 N. W. 120. As the court below stated, there was no abuse of that discretion in this case (R. 13; Vol. IV). Petitioner's witnesses had already testified in the case in chief as to the cost of restoring the building (R. 306, 408, 412–415, 419). Rebuttal testimony as to the cost of repairing the laundry and dry cleaning equipment was admitted (R. 809–812, 814; Def. Exs. 48, 49, 50, R. 822–823). The only item of machinery repair offered on rebuttal which was excluded was the cost of replacing a boiler valued by petitioner in 1942 at $8,921.25 (R. 272). As

to this item, petitioner's testimony on its case in chief was that it was damaged beyond use and therefore an allowance for its full value was made (R. 272; see R. 847); whereas, the Government's testimony was that it could be restored to first-class condition for $5,817.50 (R. 639; see R. 849). Thus, the rebuttal testimony rejected by the trial court pertained to matters which not only could have been, but had been, gone into on petitioner's case in chief, and was, therefore, properly excluded. *United States* v. *Prettyman*, 142 F. 2d 891 (C. C. A. 4).

C. *The trial court awarded the proper amount of interest.*—The term taken in this case was one beginning November 22, 1942, and ending June 30, 1943, with the right to renew the term for additional yearly periods for the duration of the emergency (R. 2). At the time of the trial the term had been extended to June 30, 1946 (R. 83–85). Consequently, the question of compensation for the whole term thus far taken was submitted to the jury, as well as the amount of damages resulting from the use of the property up to the time of the trial. Although the jury was instructed to return a general verdict for the total compensation to which petitioner was found to be entitled, it was also instructed to make special findings as to the sum payable annually and as to the amount awarded for failure of the United States to return the property in the same condition it was on November

22, 1942 (R. 161; see R. 95–96). When property is taken prior to payment therefor, interest is allowed as part of just compensation from the date of taking until payment. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306 (1923); see *Albracht* v. *United States*, 329 U. S. 599, 602 (1947). The only term "taken" on November 22, 1942, was one ending June 30, 1943 (including, of course, the right to renew for additional yearly periods). The property was not *taken* beyond June 30, 1943, until the term was renewed, the new term being taken upon expiration of the preceding term. Since the taking, therefore, was of yearly periods and since the award was made on the same basis, interest at 6 per cent was properly computed on the sum allowed for each period from the beginning of the period until the date it was paid, making allowance for the sums deposited in court from time to time as estimated compensation (see R. 103–105).[21] Petitioner contends (R. 97–98; cf. Br. 128–129) that because the term taken was to terminate ultimately (under the last renewal) on June 30, 1946, there was established "for the purpose of this case a continuous period" between November 22, 1942, and

[21] A different situation is presented when the award is arrived at by reference to comparable transactions where the rental is payable at the end of the year or the rental is payable monthly. In such cases, interest should be computed upon the same assumption as to time of payment as was the award.

June 30, 1946, thereby requiring interest on the total award set forth in the general verdict, i. e., the "ultimate award." This contention is without merit. It amounts to saying that the entire three years and six months' term was taken in November 1942, and the Government at that time became obligated to pay the total due for the entire period. This is plainly contrary to fact since the obligation to pay for additional periods arose only when the term was successively renewed. And indeed, separate declarations of taking were filed for each period, see *supra*, pp. 4–5.

Moreover, the fallacy of petitioner's contention appears if its effect in other situations is considered. If, for example, the trial had been held shortly after the Government took possession and the jury had found the fair annual rental "determined as though the government had rented the property for a year with an option to renew from year to year" (see *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (Del.), *supra*, pp. 29–30), and the Government had paid the rent thus determined each year as it renewed the term, it surely could not be contended that when the Government surrendered possession it would then have to pay interest as if the total amount of the rent ultimately paid had been due at the time possession was taken. The fact that the jury trial was not had until shortly before

the Government surrendered possession does not change the estate taken from a one-year term with an option to renew to a specified term of 3,6 years.

The argument is apparently made (Pet. 40; see also Br. 128–129; 131, par. 6) that the language of the Declaration of Taking Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a, requires interest to be computed in accordance with petitioner's contention. However, as this Court held in *Albrecht* v. *United States*, 329 U. S. 599, 605 (1947), the provision for payment of interest in that act is "no more than a statutory embodiment of the rule for determining constitutional 'just compensation' * * *."

Petitioner also contends that interest should have been allowed on the sum awarded for failure of the United States to return the property in the same condition as when taken from November 21, 1942, until paid (Br. 29, 131–132) and states (Br. 22) that no interest was allowed on this item. Interest was, in fact, allowed on this item from March 20, 1946 (the date of the verdict, R. 95), until paid (R. 105–106). Since the sum thus awarded arises out of the obligation to return the property in as good condition as when taken, reasonable wear and tear excepted, compensation for failure to comply with this obligation cannot be-

come due until the property is returned. Until that time it is not known how much, if any, damage there will be or whether the United States will itself restore the premises to their former condition before returning them or whether the owner must be compensated for the failure to return the premises in their former condition. Obviously, payment for damages occurring during the Government's occupancy is not due until the property is returned. Accordingly, the trial court was correct in awarding interest only from the date of the verdict which was rendered two days before possession was surrendered.

Petitioner further contends that it is entitled to interest on the sum of $34,875.50 for chemicals, soap and supplies alleged to have been taken on November 21, 1942, but not paid for until July 8, 1943 (Br. 23, 30, 132). The only mention of these items in the record is found in petitioner's answer and petition on appeal (R. 26, 94). The matter of acquiring the items mentioned and paying for them was handled entirely outside the condemnation proceedings and is no part of the proceedings. Moreover, the sum was paid as the result of an agreement between the United States and the Kimball Laundry Company. Interest is not allowable when just compensation is fixed by agreement of the parties. *Albrecht* v. *United States*, 329 U. S. 599, 602–604 (1947).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there is no reversible error in the rulings of the trial court and that the judgment of the Court of Appeals should be affirmed.

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